IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Shree Lal.
vs.
LRs. of Kanhaiya Lal.

S.B.CIVIL SECOND APPEAL NO.181/2004 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 14.5.2004 PASSED BY MISS PRABHA SHARMA, ADDITIONAL DISTRICT JUDGE NO.1, BHILWARA IN CIVIL APPEAL NO.9/2002.

DATE OF JUDGMENT ::: 10.5.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. Rakesh Arora, for the appellant.
Mr. Arvind Samdariya, for the respondents.

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BY THE COURT:

Heard learned counsel for the parties.

Following substantial question of law arises in this appeal :-

"Whether the judgment and decree of the first appellate court is no judgment in the eye of law because of the

fact that the first appellate court did not consider the facts, issues and evidence and even did not consider the arguments advanced by the appellant on merit of the appeal on various issues framed by the trial court and consequently, the judgment of the first appellate court cannot be said to be a judgment recording or upholding the finding of fact involved in the lis between the plaintiff and defendant ?

At the request of both the learned counsels for the parties, this appeal is decided.

It appears from the judgment and decree of the trial court dated 8.2.2002 that the plaintiff filed suit for permanent injunction, prohibitory as well as mandatory, upon which the trial court framed as many as 12 issues. The trial court heard the arguments in detail which is apparent from the judgment dated 8.2.2002 and thereafter recorded the finding issuewise. The trial court held that the land in question is land of way and the patta issued in favour of the present appellant is, therefore, null and void. The trial court decreed the suit and an appeal was preferred by the defendant.

The first appellate court after mentioning the facts in brief considered the request of the appellant for framing additional issues and observed that the trial court framed the issues in presence of both the parties and the appellant did not submit any application for framing more issues or amendment of the issues. While deciding this

point, the first appellate court straightway observed that the finding recorded by the trial court on all issues is in accordance with law. The first appellate court also observed that the issues proposed by the appellant are similar to the issues already framed by the trial court and there is a difference of language only but even if the appellant was of the view that the issues were not properly framed, then he should have requested before the trial court and, therefore, there is no need to frame the issues and remanded the matter to the trial court.

The first appellate court while considering the appellant's objection about rejection of the application filed under Order 1 Rule 10 CPC before the trial court, rejected the objection only on the ground that against the rejection of the application filed under Order 1 Rule 10 CPC, no appeal or revision was preferred by the appellant, therefore, the order of the trial court has become final. After deciding these two points, the first appellate court in four lines observed that the findings recorded by the trial court on all the issues are based on evidence and, therefore, there is no illegality.

Said judgment dated 14.5.2004 is no judgment in the eye of law because of the reason that the first appellate court did not consider any of the findings of the trial court nor considered any of the arguments of the appellant challenging the findings of the trial court nor has considered any of the evidence of the parties.

In view of the above only, in fact, there is no finding

of fact from the first appellate court before this court, therefore, the judgment and decree dated 14.5.2004 deserves to be set aside.

It is a case where remand is the only way out because of the reason that while hearing second appeal, this court cannot interfere in the finding of fact and, therefore, it will be proper to remand the matter to the first appellate court.

Consequently, this appeal is allowed, the judgment and decree of the first appellate court dated 14.5.2004 is set aside, the matter is remanded to the first appellate court to decide the appeal on merits afresh.

Both the parties are directed to appear before the first appellate court on 4.7.2006. The first appellate court is requested to decide the appeal expeditiously.

(PRAKASH TATIA), J.

S.Phophaliya